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Benjamin B. Ferencz

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REMARKS

BENJAMIN B. FERENCZ†

You've heard from Professor Rubin, a distinguished scholar, and serious thinker that there should not be an international criminal tribunal to punish crimes against humanity. He says it won't work, it would be a great embarrassment, it doesn't promote human rights and there are countless difficulties which, if he had more time he would spell them all out for you. Some of you may be relieved that [Professor Rubin] didn't have more time. I've only got 15 minutes in which to respond and so I will begin with a confession.

Let me begin with quite a different point of view particularly since my friend, Professor Rubin, commented that there are idealistic lawyers and civil servants who are not responsible for the lives of people and who really don't care about setting up lawful legal order. There happens to be a gentleman sitting in the first row here, whom I have not heard from or thought about, frankly, for 49 years. The gentleman is William Denson, a retired West Pointer and former Judge Advocate. We got to know each other under very strange circumstances. I was a sergeant in the infantry, he was a colonel. I entered many concentration camps trying to catch war criminals or to collect the evidence of their crimes. I have seen man's inhumanity to man in ways which the human mind, the normal human mind, cannot quite grasp. And he was responsible, long before Nuremberg, for trying war criminals before U.S. War Crimes Commission established by the U.S. army immediately after the war in the concentration camp at Dachau. The defendants were persons who had been captured in the camps which had been

† The following is an edited transcription of the extemporeous comments made by Mr. Ferencz at the symposium held at Pace University School of Law on October 23, 1993. Mr. Ferencz, J.D. Harvard, 1943, Adjunct Professor of Law, Pace University School of Law, Founder of the Pace Peace Center was a Chief Prosecutor at the Nuremberg Trials.

liberated by the American Army; Dachau, Buchenwald, Mauthausen, Flossenbug. I was in all those camps.

My concern did not begin with Latin knowledge of "jus in bello" or "jus ad bellum". It began with the determination that that kind of war had to end.

So, let me just look at it from another perspective. I began as Colonel Denson did, prosecuting on behalf of the United States without rules, without books, without long legal precedents but with a strong determination that what we had seen was wrong and that those who had committed those crimes should be punished. If you didn't punish the criminals, if you ignored them and only pointed to the problems, those crimes would be repeated.

Now let me tell you a little bit about Nuremberg. When the war was over, I went home. I didn't want to go back to Germany, but I did go back with General Telford Taylor who was setting up the subsequent proceedings for Nuremberg following the prosecution of Goering and others by the International Military Tribunal (IMT). Let me tell you a little bit about what we all had in mind and something about the Nuremberg trials.

The Nuremberg trials were the product of the same kind of abhorrence which I had experienced as a soldier in the field. The President of the United States, and other world leaders gave warning to Adolf Hitler and company that the day of reckoning would come. And we've heard here references to the trial as "victors' vengeance". That is a very common misconception. What was tried at Nuremberg was to put a stop to man's inhumanity by creating the rule of law.

The British, you'll be interested to know, were in favor of what they called "a political solution" — take the Nazis out and shoot them. The British are always noted for their fair play.¹ But, there were some difficulties with that — who do you shoot and when do you stop shooting? And it's to the everlasting credit of the United States, to Henry Stimson and John McCloy, his Assistant Secretary of War, who persuaded Roosevelt and the others that we're a country of laws and we try people according to the rule of law. We didn't invent the law at Nuremberg, con-

¹ See T. Taylor, *Final Report to the Secretary of the Army on Nuermberg War Crimes Trials Under Control Council Law No. 10* (Washington D.C. 1949).

trary to the common assumption that we were just victors going to express our outrage against the vanquished.

I recommend to my friend Professor Alfred Rubin that he read my two volumes on an international criminal court² where he'll find the precedents spelled out. He will find there that it goes back long before Nuremberg. It was an assassination on the bridge at Sarajevo, "the shot heard 'round the world'" that launched World War I and got 20 million people killed. The League of Nations appointed a commission to determine the responsibility of the authors of the war and an Advisory Committee of Jurists recommended the establishment of an international criminal tribunal to try the defendants.

There were some members of the Commission, including our own Secretary of State Robert Lansing, who felt it would be *ex post facto* since no sovereign had ever been tried for aggression before. The conclusion was not to create a tribunal at that time, but, to issue a warning that such crimes would be tried in future.³

German leaders should have known that the invasion, the aggression against little Belgium, was a crime. The U.S. felt that since we never tried them before, we wouldn't try them now but, rather, warn them instead. This is the last time. Next time, they'll be held accountable. And the minutes of those meetings are there.⁴

And so, we got to World War II and again the crimes were committed. Again the United States took the lead and sent a very distinguished Justice, Robert Jackson from the U.S. Supreme Court, to serve as our Chief Prosecutor. Jackson, a man of high distinction and high ethical and moral character, much concerned about the welfare of human beings and humanity, said, "We have given them enough notice." And let me quote to you, just briefly, to meet the point that has been made by Professor Rubin. Jackson gave assurance that the funda-

² BENJAMIN B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS* (1980). Vol. I, Doc. 3,4.

³ *Conference on the Preliminaries of Peace, Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, Plenary sess., Annex II* (1919), *cited in*, FERENCZ, *supra* note 2. Doc. 3 at 179.

⁴ *Id.*

mental purpose of the prosecution was the advancement of law and justice:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the more significant tributes that [P]ower has ever paid to [R]eason. . . . To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity so our task in this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.⁵

That's what Nuremberg was all about. It was *not* victors' vengeance. It was the attempt to do justice under law so that humanity would be protected. When in a dozen subsequent trials General Telford Taylor, Harvard Law graduate, professor now at the Columbia University, distinguished American citizen, followed after Jackson, the effort in those subsequent trials was always the same.

It happened to be my fate to prosecute twenty-two defendants who had murdered, in cold-blood, over a million people. Shot them down like dogs in a ditch. Men, women and children — because they were Jews, because they were Gypsies, because they were Slavs, because they were Communists, because they were considered opponents of the Nazi regime. I had these twenty-two defendants. I didn't ask for the death penalty because it seemed too absurd to talk about taking twenty-two defendants and holding them responsible for a million deaths. There was no punishment that could match that. I asked for the Court to affirm, by the rule of the law, that all human beings could live in peace and dignity under the law. That was the purpose of that trial.⁶

Now, it's true that we didn't have big precedents. It took the Nuremberg judges, led by Jackson, six weeks to draft the statutes of the International Military Tribunal.⁷ Procedural rulings of the subsequent Nuremberg Courts are contained in

⁵ FERENCZ, *supra* note 2, at 71.

⁶ *Trials of War Criminals Before the Nuernberg International Military Tribunals*, Vol. 4 at 30.

⁷ *International Military Tribunal*, 1 Official Documents 8, *Trial of the Major War Criminals* (1947).

Volume 15 of a 15 volume series.⁸ An absolutely fair trial, under law, the kind of trial which they never gave to any man. It was conducted by the United States and by the International Military Tribunal at Nuremberg.

So, to come here and listen to critique of a statute which has finally come out of the United Nations after all these years, and pick it apart (tear it to shreds, perhaps) seems to me to miss the main point. And that is the historical movement of what we are witnessing.

We are witnessing the attempt of civilized human beings to create a new form of justice under law. Surely there are difficulties. We can agree with many of the points raised by my friend Professor Rubin. But these difficulties can be overcome. We have to overcome them. If we look for a problem for every solution, we'll never move forward.

The Nuremberg Charter defined three categories of crimes. The first was the crime against peace, aggression. I won't spell it out in detail - read the two volumes I wrote on that subject.⁹

The next was crimes against humanity. That was the important point. Because we knew aggression was a crime after the First World War, we said so. War crimes had a tradition going back to 1899 and before in the Hague Conventions, but crimes against humanity was something new. The IMT Charter said crimes against humanity, namely murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, persecutions on political, racial, or religious grounds, these were the crimes against humanity we were reaching out for. The complaining party was not merely the victim, not merely the State (as it is in New York), it was all of humankind. That was the offended body because the crimes had reached such a magnitude that no state could cope with them. The states themselves were the perpetrators of the crimes. We were trying to reach beyond that, and the United Nations Charter also tried to reach beyond it.

The First General Assembly of the United Nations confirmed, unanimously, all of these principles of international

⁸ See *supra* note 6, Vol. 15 (1949).

⁹ FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* (1975).

law: that heads of state cannot evade responsibility; that superior orders are no excuse — will be no defense; that there are crimes against humanity which are criminal acts which shall be prosecuted and those responsible, found guilty after a fair trial, will be held to personal account. That's what we were trying to do.

Now, it didn't work as we had hoped. True, as Professor Rubin points out, and as Professor Sinha has pointed out, the crimes have been committed elsewhere. Nuremberg was the last such international tribunal. There have been no Nuremberg trials since then, and millions of people have died as a result of the same kinds of persecutions and mass murders under the name of genocide, ethnic cleansing, whatever you want — and are continuing to die as we sit here and speak.

And so I say, "Well, what is our responsibility, as members of the international community, as human beings, as lawyers, as international lawyers?"

To point to the difficulties and say we can't do anything? We have been doing that ever since Nuremberg. Now finally the U.N. is beginning to break through with a statute which I won't talk about because we have many experts here who will deal with it.¹⁰ Finally, we are beginning to break through, although surely in an inadequate way.

One of my books speaks of planetary needs.¹¹ We must share this planet and learn to live in it in peace and dignity for everyone. There is no sense in talking about international tribunals limited to crimes committed in one country. Law applies to everyone. It applies to the United States. It applies to the Soviet Union. These were things we couldn't cope with at Nuremberg. We had a limited area. We did the best we could. But now we should go forward from there.

No one pretends that international law should be limited to one country, one time, one place. That's not what law means. Law means that it applies to everyone and no one need fear law, if they're prepared to behave in a lawful way.

¹⁰ See B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375 (1992).

¹¹ BENJAMIN B. FERENCZ, (WITH K. KEYES JR.), *PLANETHOOD: THE KEY TO YOUR FUTURE* (1991).

So, what we see here in conclusion is, how do we get from here, this terrible world, to the world we hoped for at Nuremberg? How do we move from man's bestiality, which is the only word for it, to a world of tolerance and human compassion? It will not be easy. We need all the help we can get. Sometimes the critics are helpful. They point to difficulties. But we mustn't stop with the criticism. The criticisms are there to be overcome and to the man who criticizes me, I say, "If you have a better idea than what I have, I welcome it. Come, give me your improvement. But don't tell me it can't be done, that I must continue to live in this kind of a world." I refuse, I will not accept that, and that's the subject of my next book.¹²

So what can I ask you to do? What can you do? You sit here as lawyers, human beings and you say, "Well, you make sense, but it's really too difficult." Professor Rubin has pointed out that there are so many complications.

There aren't that many complications. When I was a young idealistic fellow I saw the complications then too and I said, "Let's move forward, try." Will Colonel Denson sitting here tell you that he convicted innocent people? He did not. They were as guilty as hell.

So, the approach that I recommend to you - and to me - is do the best you can. If you don't know the direction in which you want to go, it's not likely that you'll get to the right place. You've got to know what supports the ultimate goal. If we are moving in the right direction, support it. We need a new way of thinking, a new way of enforcing the United Nations Charter.

Professor Rubin spoke about non-interference in internal affairs. We dealt with that at Nuremberg. We didn't have the U.N. Charter. The Charter of the International Military Tribunal was signed the same day as the United Nations Charter. But we knew that there were crimes against humanity. When we talk about non-interference in internal affairs we don't mean that a state can go about and start killing all of its citizens and it's none of our business. It became our business. We made it our business. We made it not only our right but our duty to stop it.

¹² B. Ferenze, *New Legal Foundations for Global Survival-Security Through the Security Council* (Oceana, 1994).

My answer to the question, "Should there be an international tribunal for crimes against humanity?" is "of course there should be." The sooner you begin to recognize that need and work toward it, the sooner we'll have it.